Filed 2/20/19 P. v. Howard CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ERIC ANTHONY HOWARD, Defendant and Appellant.	A150590 (Solano County Super. Ct. No. FCR307888)

Eric Anthony Howard was convicted by jury of a single count of possession of ammunition by a prohibited person. (Pen. Code,[1] § 30305, subd. (a)(1).) On appeal, Howard contends the trial court deprived him of his right to effective assistance of counsel when it improperly instructed the jury. He further claims the trial court failed to directly answer a question from the jury regarding mental state. We affirm.

I. BACKGROUND

On May 23, 2014, Officer Jacobsen stopped Howard's vehicle for traffic violations, including speeding and an inoperable brake light. Howard was the driver and sole person in his car.

When Officer Jacobsen first approached Howard in his vehicle, he saw Howard's head and hands shaking. Officer Jacobsen asked Howard if he was on probation or parole and if he had anything to be concerned about in his car such as a gun. Howard responded he was not on probation or parole and did not have a gun. After Officer

[1] Statutory references, unless otherwise indicated, are to the Penal Code.

Jacobsen pressed Howard on why he was nervous, Howard admitted he "might" have ammunition in his trunk because he shot guns at a shooting range in Vacaville. Howard did not know the type of bullets he had and asked Officer Jacobsen to tell him. Soon after, Howard admitted he had a past conviction for "something," but claimed he did not know the charge, sustained just after he turned 18 years old.

Based on Howard's admissions to possibly possessing ammunition and to having been convicted, Officer Jacobsen concluded Howard might be a felon in possession of ammunition. So, he asked Howard to step out of his car, searched Howard for ammunition or other contraband, and found ammunition in Howard's left coat pocket. Howard explained that he would shoot while wearing that coat. Officer Jacobsen then searched Howard's car and found a 10-millimeter bullet between the driver's seat and center console and two .40 caliber bullets in the trunk along with three spent casings. Officer Jacobsen requested a record check over the radio to confirm Howard had a prior felony conviction. During his conversation with Howard, Officer Jacobsen also learned Howard had just moved to a transitional living facility after living in his car. Soon after, Officer Jacobsen arrested Howard.

At trial, the only witness was Officer Jacobsen, who testified about finding the ammunition in Howard's pocket and trunk. The prosecutor also admitted the video of Howard's stop and arrest, a photograph of the ammunition seized from Howard, and the actual ammunition seized from Howard. Howard presented no evidence.

During closing argument, the prosecutor asked the jury to focus on whether Howard knew about the ammunition in his pocket and trunk. She highlighted Howard's answer that he "might" have bullets in his car and argued Howard would not have "offer[ed] up something he had no reason to believe." She concluded, "Everything he says, his demeanor, the words he uses. He knows he has the bullets, and then there's only one reasonable conclusion you can come to, and that is that he's guilty."

During the defense's closing argument, defense counsel contended, "knowledge is critical . . . . and the prosecutor has not proven . . . beyond a reasonable doubt that [defendant] knew that he had ammunition." Defense counsel then unilaterally narrowed

the jury's inquiry to whether defendant possessed ammunition on May 23, 2014. She claimed Howard was unaware of what was in his car because he had been recently released from custody and was living in his crammed car. Defense counsel surmised that defendant gave Officer Jacobsen permission to search his vehicle because he was unaware of ammunition in his pocket or trunk.

After closing arguments concluded, the jury began deliberating. During deliberations, the jury sent a note reading, "A definition of forgetting, is forgetting the same as knowing in the past?" The court proposed providing a definition of forgetting and explaining the crime was alleged to have taken place on or about May 23, 2014. Defense counsel instead asked the court to instruct the jury that it must "determine whether or not on the date specified in the complaint [Howard] knowingly possessed ammunition." The court responded, "The Information is what it is, and it says on or about . . . . That means, legally it doesn't have to be on 23 May." Defense counsel responded, "[U]nless they ask for clarification on what on or about means . . . we direct them back and say on the date as it is specified in the Complaint because I think that [it] then encompasses what the Complaint states. If they need further clarification, they can ask for it." The court responded it was "not going to do that." The defense attorney then asked the court to read back the complaint without additional commentary, which the court agreed to do.

At that juncture, the court brought the jury back into the courtroom. The court provided a definition of forgetting to the jury and reminded the jury that the Information read, "on or about May 23rd, 2014, it's alleged the defendant, Mr. Howard, did commit a felony, namely, possession of ammunition." Afterward, the court ordered the jury back into the jury room.

Later that afternoon, the jury found Howard guilty of being a felon in possession of ammunition. This appeal followed.

II. DISCUSSION

A. Ineffective Assistance

Howard alleges the court deprived him of effective assistance of counsel when it instructed the jury that the information alleged he possessed ammunition "on or about May 23, 2014" rather than "on May 23, 2014."

"The precise time at which the offense was committed need not be stated in the accusatory pleading, but it may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense." (§ 955.) It is usually therefore only necessary to prove the offense happened reasonably close to the charged date rather than the exact date. (§ 955; *People v. Richardson* (2008) 43 Cal.4th 959, 1026–1027.) However, it may become necessary to prove the exact date if a defense concerns the precise place and time of the offense. For instance, the exact date and time are material if a defendant presents an alibi or lack of opportunity defense. (*See, e.g.*, *People v. Barney* (1983) 143 Cal.App.3d 490, 497 [error to instruct using "on or about" as lack of opportunity defense made exact time of commission critical to defense]; *People v. Jones* (1973) 9 Cal.3d 546, 557[same but with alibi defense], overruled on other grounds in *Hernandez v. Municipal Court* (1989) 49 Cal.3d 713, 719.)

But possessory offenses, such as possession of ammunition or a deadly weapon, are " 'continuing offense[s], one[s] that extend[ ] through time" and create criminal liability "throughout the entire time the defendant asserts dominion and control." (*People v. Bland* (1995) 10 Cal.4th 991, 999.) Alibi and lack of opportunity defenses therefore typically do not apply.

Here, the prosecution was not required to prove the exact time and date of the offense because neither was critical to Howard's defense. Howard admitted he had bullets in his trunk and, later, in his coat from shooting in Vacaville. He used the present tense when talking about going to the shooting range in Vacaville. Although Howard was living in his vehicle and had only recently been released from custody, no evidence was presented that Howard possessed the ammunition prior to becoming a prohibited

person or the statute of limitations. All the evidence indicates the opposite: Howard was aware of the ammunition because he had recently gone shooting in Vacaville.

Nevertheless, Howard claims he was deprived of his right to effective assistance of counsel because the "trial court told jurors the state did not have to prove the crime occurred on May 23, 2014," which he alleges vitiated his defense that he lacked knowledge of the ammunition on that precise date. In support, Howard cites several distinguishable cases where the exact date was essential to defeating an affirmative alibi or lack of opportunity defense.

The most pertinent case cited by Howard is *People v. Gavin* (1971) 21 Cal.App.3d 408, because it concerned jury confusion about the charging phrase "on or about." In *Gavin*, the prosecution charged Gavin with possession of LSD and amphetamines. (*Id.* at p. 411.) During trial, defendant admitted to possessing amphetamines (not LSD) after learning her roommate was selling amphetamines in her home about a month before she was arrested for the incident for which she was on trial. (*Id.* at p. 418.) During deliberations, the jury asked the court to re-read the jury instruction addressing the phrase "on or about" and, after being reread the instruction, asked whether "on or about" meant minutes or days. (*Id.* at pp. 416–417.) Soon after, the jury asked whether LSD was present during the uncharged incident. (*Ibid.*) As the first incident involved only amphetamines, the defense attorney alerted the court that the jury might be confused about whether they could convict defendant of the earlier uncharged possession, but the court declined to clear up the jury's confusion. (*Id.* at pp. 417–418.) The jury then returned a split verdict confirming the confusion: guilty for possession of amphetamines but not LSD, which was more consistent with a conviction for defendant's earlier conduct involving only amphetamines than charged conduct involving both LSD and amphetamines. (*Id.* at p. 418.) Overturning Gavin's conviction, the Court of Appeal explained the trial court had a duty to correct the jury's confusion after "the jury itself called attention to the ambiguity, and the defense counsel specifically pointed out the defect and its possible consequences." (*Ibid.*)

Although *Gavin* discussed the "on or about" phrase presented here, it is inapplicable because the prosecution introduced no prior acts that could have confused the jury. The jury's confusion about whether the exact date of the possession needed to be proven resulted from defense counsel's focus on Howard's knowledge on the exact date during closing argument. As the trial court recognized, the prosecution was not required to prove the exact date, so Howard's lack of knowledge on the exact date charged was not an adequate defense. (§ 955; *Richardson*, *supra*, 43 Cal.4th at pp. 1026–1027.)

Other cases cited by Howard are even more easily distinguished. For example, Howard cites *Geders v. United States* (1976) 425 U.S. 80 and *Perry v. Leeke* (1989) 488 U.S. 272, to argue no harm must be shown to reverse his conviction because state interference deprived him of counsel. But *Geders* and *Leeks* concerned court orders prohibiting defense counsel from communicating with the defendants during trial, which did not occur here. (*Geders*, *supra*, 425 U.S. at pp. 82–86; *Perry*, *supra*, 488 U.S. at pp. 274–275.)

In addition, Howard analogizes his case to *Sheppard v. Reese* (9th Cir.1990) 909 F.2d 1234, where a Ninth Circuit panel held Sheppard's right to counsel was violated when the prosecution requested a felony-murder jury instruction after closing argument for the first time, changing its theory of the case after the close of evidence and thereby preventing defense counsel from defending against that theory of the case. (*Sheppard*, *supra*, 909 F.2d at pp. 1235–1236.) The panel overturned Sheppard's conviction because the prosecution's failure to timely notify Sheppard of its theory of the case prevented him from presenting a defense. (*Id.* at pp. 1235–1237.) Similarly, Howard cites three cases in which trial courts changed jury instructions from those it had informed the parties would be used before closing arguments, thereby allegedly depriving defendants of their right to counsel: *United States v. Gaskins* (1988) 849 F.2d 454; *Harvill v. United States* (9th Cir.1974) 501 F.2d 295, 297 (per curiam); *Wright v. United States* (9th Cir. 1964) 339 F.2d 578.

But these cases are inapplicable because the court did not change the jury instructions in this case, which were primarily given before closing argument. The charging language did not change. Defense counsel was aware of both the jury instructions and charging language prior to presenting closing argument. It is therefore unclear how the court's answer deprived Howard of effective assistance of counsel.

We agree with the Attorney General that the real issue is whether the jury was properly instructed regarding the "on or about" charging language. "In determining the correctness of jury instructions, we consider the instructions as a whole. [Citation.] An instruction can only be found to be ambiguous or misleading if, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words." (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237, citing *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1061 & *People v. Frye* (1998) 18 Cal.4th 894, 957.) We review instructional error claims de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569–570.) Claims of instructional error, however, are forfeited if defense counsel expresses agreement with the judge's intended answer. (*People v. Salazar* (2016) 63 Cal.4th 214, 248–249 ["counsel's affirmative agreement with the court's reply to a note from the jury forfeits a claim of error"]; *People v. Rogers* (2006) 39 Cal.4th 826, 877 [even acquiescence works as a forfeiture]; *People v. Roldan* (2005) 35 Cal.4th 646, 729 [failure "to object or move for a mistrial" may constitute "tacit approval"]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1133–1134.)

In this case, the court agreed to read the charging document as requested by defense counsel, thereby forfeiting any related instructional error claim. Even assuming Howard's instructional error claim was not forfeited, Howard would still lose on the merits because he cannot demonstrate the jury misconstrued or misapplied the jury instructions given.

B. Jury Response Error

Howard further claims the court erred by failing to directly response to the jury's question "[i]s forgetting the same as knowing in the past?" Howard instead contends the court should have responded forgetting was not the same as knowing in the past.

After informing counsel, the court is required to respond to jury questions "on any point of law arising in the case." (§ 1138.) "The court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky. " (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) "This does not mean the court must always elaborate on the standard instructions." (*Ibid.*) But " '[a] definition of a commonly used term may nevertheless be required if the jury exhibits confusion over the term's meaning.' " (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1015 [citations omitted].)

Prior to providing the jury with the guidance it requested, the court discussed its intended response with the parties and explained the prosecutor was not required to prove Howard knew about the ammunition on May 23, 2014 because the information charged him with the phrase "on or about." (§ 955; *Bland*, *supra*, 10 Cal.4th at p. 999.) After bringing in the jury, the court responded to the jury's question on the record by providing a definition of "forgetting" and re-reading the Information.

Howard cites numerous cases discussing the court's obligation to respond to legal questions posed by a jury. (See, e.g., *People v. Thoi* (1989) 213 Cal.App.3d 689, 698; *People v. Kageler* (1973) 32 Cal.App.3d 738, 745–746; *Gavin, supra,* 21 Cal.App.3d at pp. 418–419.) But he fails to provide any support for the contention that in response to *this* particular question, the court was obligated to tell the jury that forgetting was not the same as knowing in the past. In fact, a quick glance at three dictionaries proves that Howard is also wrong about the definition of "forget." Merriam Webster defines forget as "to lose the remembrance of, be unable to think or recall." (Merriam-Webster's Online Dict. (2019)<https://www.merriam-webster.com/dictionary/forget> [as of Feb. 20, 2019].) The Oxford English Dictionary defines "forget" as "fail to remember." (Oxford English Dict. Online (2019) <https://en.oxforddictionaries.com/definition/forget> [as of Feb. 20, 2019].) The

American Heritage Dictionary defines "forget" as "to be unable to remember (something)." (American Heritage Online Dict. (2019) <https://www.ahdictionary.com/word/search.html?q=forget> [as of Feb. 20, 2019].) A court must not respond in the manner requested by defense counsel if doing so would require it to set aside the meaning of common English terms. (CALCRIM No. 200 ["Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings."]; *People v. Raley* (1992) 2 Cal.4th 870, 901.) Accordingly, we conclude the trial court exercised its discretion in a reasonable and prudent manner.

But even if the court erred, the error was harmless under either *Chapman v. California* (1967) 386 U.S. 18, 24, requiring the state to prove harmlessness beyond a reasonable doubt, or *People v. Watson* (1956) 46 Cal.2d 818, requiring a reasonable probability of a result more favorable to defendant. (*Chapman*, *supra*, 386 U.S. at p. 24; *Watson, supra*, 46 Cal.2d at p. 836.) Even though he used hedging language, Howard admitted he had bullets in his trunk and, later, in his coat from shooting in Vacaville. During the stop, Howard admitted twice that he had recently been shooting at a Vacaville shooting range. Some of the ammunition was found in the pocket of a jacket Howard was wearing. Any notion that Howard truly forgot was dispelled by his nervous behavior and admissions. Defining a "forgetting" incorrectly or declining to define "forgetting" would not have changed the ultimate result.

III. DISPOSITION

The judgment is affirmed.

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Streeter, J.

We concur:

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Pollak, P.J.

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Tucher, J.